IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 569

THE ASPINOOK CORPORATION,
Petitioner,

vs.

THE HONORABLE JOHN BRIGHT, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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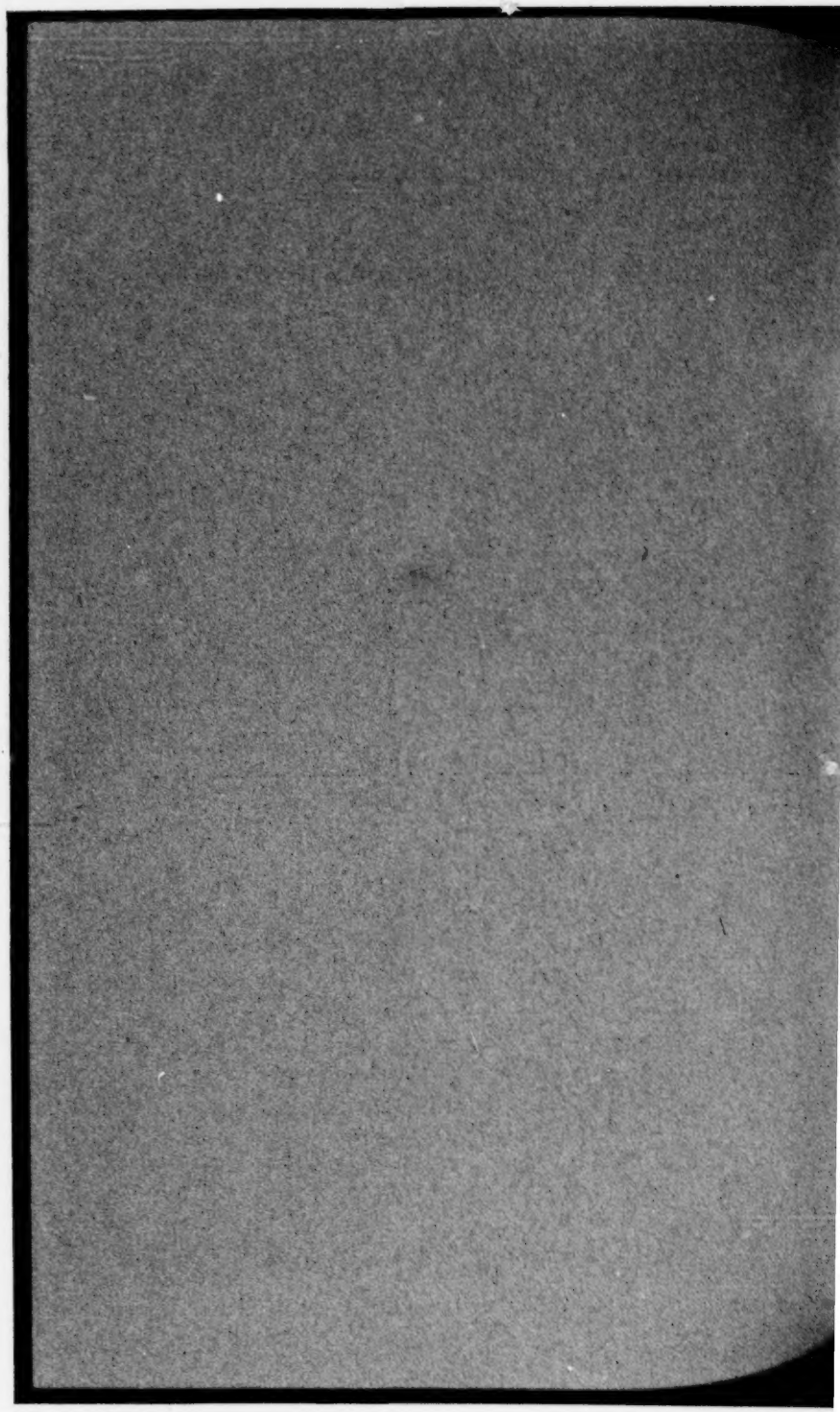

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petition of The Aspinook Corporation, a corporation of the State of Delaware, respectfully shows to this Honorable Court:

I

Statement of Matter Involved

Petitioner seeks to secure a review and reversal of an order (R. 119) of the United States Circuit Court of Appeals for the Second Circuit which denied its petition (R. 1-18) for a writ of mandamus directed to the Honorable John Bright, District Judge of the United States for the Southern District of New York, directing him (a)

to vacate an order made by him and entered in the office of the Clerk of the said District Court on August 28, 1947, in a stockholder's derivative action pending in that Court wherein Samuel Thompson is plaintiff and William A. Broadfoot and others, including the petitioner, are defendants (R. 61-74), denying the motion of the petitioner for an order requiring said Samuel Thompson to give security in accordance with Section 61-b of the New York General Corporation Law; and (b) to make and file an order (1) granting the said motion for security; (2) requiring the plaintiff or the plaintiffs-intervenors to furnish, within ten days after the entry of such order, security pursuant to said Section 61-b in the sum of $90,000 for the reasonable expenses, including attorneys' fees, which may be incurred by the petitioner and by the individual parties defendant in the action in connection therewith and for which the petitioner may become liable under the provisions of Section 64 of the New York General Corporation Law; and (3) staying all further proceedings on the part of the plaintiff and the plaintiffs-intervenors in said action, except to review or to apply for the modification or vacating of such order, until the direction to furnish security is complied with.

The Circuit Court of Appeals denied the petition (R. 119), two of the Judges holding that the case was not one for the application of the extraordinary remedy of writ of mandamus (R. 116-117) and one of the Judges holding that the petition should be denied on the merits because the requirement for security contained in Section 61-b of the New York General Corporation Law is "procedural" so far as the Federal Courts are concerned and that there is therefore no obligation upon the Federal Courts to apply the statute (R. 118).

Section 61-b of the New York General Corporation Law (see Appendix hereto), [illegible] far as material to this case,

provides that in any action instituted or maintained in the right of any foreign or domestic corporation by the holders of less than five per centum of the outstanding shares of any class of the stock of such corporation (unless the shares held by such holder or holders have a market value in excess of $50,000) the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorneys' fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to Section 64 of the New York General Corporation Law. The corporation has recourse to the security in such amount as the court shall determine upon the termination of the action.

By virtue of Section 64 of the New York General Corporation Law (see Appendix hereto) each individual defendant in the action hereinabove referred to is entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of said action and in connection with any appeal therein, assessed against the petitioner upon court order in the manner and to the extent provided by Sections 65, 66 and 67 of the New York General Corporation Law and in the instances specified in Section 68 thereof (see Appendix hereto), except to the extent that it is adjudged in such action that the several individual defendants are liable for negligence or misconduct in the performance of their duties.

The circumstances out of which the present proceedings arose are as follows:

On December 5, 1946, the subject action was instituted in the District Court of the United States for the Southern

District of New York by the said Thompson, a citizen and resident of New York and the owner and holder of 200 shares of the capital stock of the petitioner, against William A. Broadfoot and others, including the petitioner (R. 4-5, 60-70).

Thereafter and on December 10, 1946, an amended complaint was duly served (R. 61-70) and filed and subsequently the amended complaint was further amended by agreement of the parties (R. 61-76). All the individual defendants were, at the time of the events related in the amended complaint, directors of the petitioner (R. 62). The said action is now pending undetermined. Jursidiction of the District Court depends solely upon diversity of citizenship (R. 61).

After the action was commenced and after the petitioner moved in said action for securtiy in accordance with the statute above referred to, one Herman Hantsch and one David Magowan, the owners and holders of 400 shares and 300 shares, respectively, of the capital stock of the petitioner, were permitted to intervene as parties plaintiff without prejudice to prior proceedings in the action (R. 5, 109-111). The plaintiff Thompson and the plaintiffs-intervenors have not at any time been the holders or owners in the aggregate of five per centum or more of the outstanding shares of any class of the petitioner's stock and the shares of the petitioner's capital stock held and owned by them in the aggregate have not at any time had a market value of or in excess of $50,000 (R. 11, 25-26).

The amended complaint as further amended alleges four causes of action. The substance of those causes of action is as follows:

The first cause of action seeks to impress a trust upon fifty per centum of the capital stock of the corporate defendant Lawrence Print Works, Inc., owned by the individual defendant Armour, alleged to have been issued to

him under circumstances constituting the transaction a gift to him of property of the petitioner, and to recover damages for alleged breaches of fiduciary duty (R. 61-67, 70). The second cause of action seeks to impress a trust upon fifty per centum of the common stock of the corporate defendant Arnold Print Works, Inc., owned by the individual defendant Armour, alleged to have been issued to him under circumstances constituting the transaction a gift to him of property of petitioner, and to recover damages for alleged breaches of fiduciary duty (R. 67-70). The third cause of action seeks to recover damages alleged to have been suffered by the petitioner and by the corporate defendants Lawrence Print Works, Inc., and Arnold Print Works,, Inc., by reason of improper transactions between them and other corporations in which the individual defendant Armour is interested (R. 71-73). The fourth cause of action seeks to recover damages alleged to have been suffered by the petitioner and the corporate defendants Lawrence Print Works, Inc., and Arnold Print Works, Inc., by reason of the establishment and operation of certain bonus or incentive compensation plans (R. 73-74).

In substance, the answers deny the allegations of wrongdoing in the amended complaint (R. 77-78, 87-88, 97-99) and allege (1) facts showing that the transactions complained of in the first two causes of action were proper (R. 78-79, 83-85, 88-91, 93-95, 99-101, 103-105); (2) that there have been ratification thereof, acquiescence therein and laches in attacking the same (R. 81-82, 85-86, 91-92, 95-96, 102, 106); (3) that the action is barred by the statute of limitations (R. 82, 86, 92, 96, 102, 106), and (4) that the plaintiff was not a stockholder at the time of the inception of the transaction which is the subject of the first cause of action (R. 82, 92-93, 103). The third and fourth causes of action are deemed controverted (R. 75-76).

The petitioner moved before the respondent in the District Court for the aforementioned order for security on

January 29, 1947 (R. 20-21). Affidavits submitted in support of the motion showed that the aggregate of these expenses would be not less than $90,000 (R. 32-33, 37-38) and no question was raised by the opposing affidavits with respect to the reasonableness or necessity of the amount specified or the amount or market value of the plaintiff's stock interest (R. 39-59). The motion was denied by the respondent without opinion. From the order denying the motion petitioner prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, which court, upon the motion of the plaintiff, dismissed the appeal on the ground that the order denying the motion was not final (R. 19). Thereafter the said petition for writ of mandamus was filed by petitioner in the United States Circuit Court of Appeals for the Second Circuit, as hereinbefore stated.

II

Reasons for Allowance of Writ of Certiorari

It is respectfully submitted that this Court should grant a writ of certiorari and review the decision of the United States Circuit Court of Appeals for the Second Circuit for the following reasons:

1. The United States Circuit Court of Appeals erred in deciding and holding that the circumstances of the case at bar did not warrant the exercise of its power to grant the extraordinary remedy of writ of mandamus.

2. The court below erred in its application of the decisions of this Court relating to the issue of writs of mandamus by a Circuit Court of Appeals.

3. The court below erred in not deciding and holding (1) that Section 61-b of the New York General Corporation Law creates a constitutionally valid substantive right in petitioner; (2) that the circumstances of the case at bar justify the exercise by the court of its extraordinary juris-

diction to issue writs of mandamus; and (3) that in the exercise of that jurisdiction the court should issue the writ for the relief prayed for.

4. The court below erred in not deciding and holding that, unless the motion for the security provided by Section 61-b of the New York General Corporation Law is granted, petitioner may be irreparably damaged by the denial of the protection of a right conferred by applicable state law.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify to and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 20825, The Aspinook Corporation, Petitioner, vs. The Honorable John Bright, District Judge of the United States for the Southern District of New York, Respondent, and that the said order of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

February 2, 1948.

THE ASPINOOK CORPORATION,

By DEAN HILL STANLEY,
Counsel for Petitioner.

WILLIAM F. BLEAKLEY,
THOMAS F. DALY,
JOSEPH R. KELLEY,
ARTHUR D. BRENNAN,
of Counsel.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion, per curiam, of the Circuit Court of Appeals for the Second Circuit and the concurring opinion of Frank, J., are printed at pages 116-118 of the Record. The respondent rendered no opinion in the District Court.

II

Jurisdiction

The order of the Circuit Court of Appeals for the Second Circuit now presented for review is dated the 30th day of December, 1947, and it was made and filed on that day (R. 119). This Court has jurisdiction to issue a writ of certiorari and to review the case in the Circuit Court of Appeals for the Second Circuit by virtue of the Act of February 13, 1925, c. 229, as amended; 43 Stat. 936; Title 28, Section 347, U. S. Code. In the alternative, jurisdiction to issue such writ and to review the order of the Circuit Court of Appeals exists by virtue of the Act of March 3, 1911, c. 231, Section 262; 36 Stat. 1162; Title 28, Section 377, U. S. Code.

III

Statement of Case

The case in the Circuit Court of Appeals is a proceeding for a writ of mandamus (R. 1-18) to require the respondent to apply Section 61-b of the New York General Corporation Law in a stockholder's derivative action in the United States District Court for the Southern District of New York, instituted and maintained by a citizen and resident of New York, in the right of a Delaware corporation amenable to the service of process therein, against director defendants who are citizens and residents of states other than New York and two other affiliated Delaware corporations (R. 4-5, 10-13, 16-17, 61-64, 67-68). The petition in the Circuit Court of Appeals was based upon the pleadings (Exhibits 8-12C, R. 60-107); the papers read on the petitioner's motion for security (Exhibits 2-7, R. 20-59), the order denying that motion (Exhibit 1, R. 19-20) and

other filed papers (Exhibits 13, 14, R. 108-111). The District Court action is within the purview of the New York statute and the plaintiff in that action is subject to the condition imposed thereby upon the institution and maintenance of such an action (R. 11-13). The situation in that respect is unaffected by the addition of two plaintiffs-intervenors after the making of the motion for such security (R. 5, 7-8; Exhibit 14, R. 109-111). As a matter of New York law the right of the petitioner is determinable as of the date of the commencement of the action, i.e., December 5, 1946, or the date of the making of the motion for security, i.e., not later than February 18, 1947 (R. 4, 7), and cannot be affected by subsequent interventions (*Matter of Baker* v. *Macfadden Publications, Inc.*, 270 App. Div. 440, followed in *Weinstein* v. *Behn*, 68 N. Y. Supp. 2d 199, 201).

The ground for mandamus, after the dismissal of the appeal from the order denying the motion, was the inadequacy of appeal as a remedy and the imminent danger of irreparable damage in view of the nature of the state statute, which prescribes a condition to the institution and maintenance of such an action in the form of security for the expenses to which the subject corporation may be liable by virtue of Section 64 of the New York General Corporation Law, without, however, imposing upon the plaintiff in such action either personal liability for those expenses or a personal obligation to furnish such security or a personal liability for failure to furnish the same, leaving a stay of the prosecution of such action as the only available mode for the effectuation of the statutory condition (R. 8-9, 13-13; see also *Shielcrawt* v. *Moffett*, 294 N. Y. 180, for construction of the statute and *Matter of Baker* v. *Macfadden Publications, Inc.*, supra, as to form of order granted by state courts to effectuate the statutory condition).

The affidavits in support of the motion for security in the District Court set forth the facts showing that such

action was within the purview of the statute (R. 22-26) and that the amount of security applied for was reasonably required (R. 32-33, 37-38), as well as facts relating to the merits of the action (R. 26-32, 34-36). The affidavits in opposition did not present any issue as to the facts which brought the action within the purview of the state statute or as to the reasonableness or necessity of the amount of security sought. Those affidavits dealt largely with the merits of the action and raised the points that the statute is not applicable to actions in the federal court and that the same is unconstitutional (R. 39-59).

The answer of the respondent to the petition in the court below denies so much thereof as alleges that two applicants for leave to intervene (whose application had been denied) became stockholders after the dates of the transactions complained of in the amended complaint (R. 5, 112); so much thereof as alleges the applicability of the statute in question, irreparable damage to the petitioner and inadequacy of the remedy by appeal (R. 12-14, 112); and knowledge or information as to so much thereof as alleges corporate action by the petitioner pursuant to Section 2(10) of the Delaware General Corporation Law (R. 11-12, 112). The answer alleges affirmatively that the denial of the motion for security was based upon the grounds set forth in *Boyd* v. *Bell,* 64 F. Supp. 22 (S. D. N. Y., 1945) and in the exercise of discretion (R. 112). The affidavit of the attorney for the respondent raises no issue as to any of the facts alleged in the petition (R. 115-119). Since the legal basis of the petitioner's application is the law of New York, the answer presents no issue as to any fact upon which the right to security depends.

For a more complete statement of the case reference is made to the brief of the petitioner in support of a petition for a writ of mandamus, as alternative relief, submitted herewith.

IV

Questions Involved

The following questions are presented by the Record;

I. Where (1) a statute imposes a condition upon the institution and maintenance of a stockholder's derivative action, to wit, that a plaintiff holding less than a specified amount of stock must give security for the amount of the expenses of the subject corporation in such action and of the individual defendants therein for which the subject corporation is liable in stated contingencies under a related statute, without imposing upon such plaintiff a personal liability for such expenses or a personal obligation to furnish such security or a personal liability for failure to furnish the same; and (2) where an application is duly made by the subject corporation in the court in which such an action is pending for an order in accordance with such statute requiring the plaintiff therein to give such security and for a stay of the prosecution of such action until such security is given; and (3) where it is undisputed that, if such statute be valid and applicable in the court wherein such action is pending, the amount of the plaintiff's stockholdings are such that he is subject to the statutory condition; and (4) where no issue is raised with respect to the reasonableness or necessity of the amount of security applied for in relation to the prospective expenses; and (5) where an order is made denying such application and an appeal from that order is dismissed on the ground that the order is not final, should the order denying such application be reviewed on the merits in a proceeding for a writ of mandamus to require the vacating of the order of denial and the making of an order granting such application for security and staying the prosecution of such action until security is given?

II. Is the subject corporation in such an action pending in a United States District Court which sits in a state whose legislature has enacted such a statute, applicable, by its terms, to any such action instituted or maintained in the right of any foreign or domestic corporation, entitled to security in accordance with such statute where (1) the plaintiff in such action is a citizen and resident of the state of the forum; (2) federal jurisdiction depends solely upon diversity of citizenship; (3) the venue of the said District Court depends upon the residence of the plaintiff; and (4) the highest court of the state of the forum has held that the said statute differs from purely procedural statutes in purpose and effect and that the said statute creates a remedy for a wrong for which previously there was no remedy and gives to corporations rights not previously enjoyed?

III. Is Section 61-b of the New York General Corporation Law repugnant to the due process of law or the equal protection clauses of the Constitution of the United States (Amendments V and XIV) or of the State of New York (Article I, Sections 6 and 11) or to the obligation of contracts clause of the Constitution of the United States (Article I, Section 10) or to the full faith and credit clause of the Constitution of the United States (Article IV, Section 1)?

V

Specification of Errors to be Urged

The petitioner assigns the following as error:

1. The refusal of the court below to review on the merits the order of the respondent which was the subject of the proceeding for a writ of mandamus in that court;

2. The failure of the court below to decide that the petitioner was entitled to security in accordance with Section 61-b of the New York General Corporation Law in the amount applied for and to a stay of the prosecution of the subject action until such security was given; and

3. The failure of the court below to decide that Section 61-b of the New York General Corporation Law was not repugnant to any of the constitutional provisions above referred to.

VI

Summary of Argument

A. This is an extraordinary case in which the remedy of mandamus is appropriate because of the inadequacy of the remedy by appeal.

B. The petitioner is entitled to security in the amount applied for and to a stay of prosecution of the subject action until it is given, because Section 61-b of the New York General Corporation Law creates a new and valuable substantive right and expresses and implements the public policy of New York in relation to a scandal and an abuse found by the legislature of New York to exist in the field of stockholders' derivative actions.

C. The statute is not repugnant to any provision of the Constitution of the United States or of the State of New York invoked by the respondent.

A

THIS IS AN EXTRAORDINARY CASE IN WHICH THE REMEDY OF MANDAMUS IS APPROPRIATE BECAUSE OF THE INADEQUACY OF THE REMEDY BY APPEAL.

The petitioner relies upon:

28 U. S. C. 377;
Ex parte Fahey, 332 U. S. 258;
U. S. Alkali Export Assn. v. *U. S.,* 325 U. S. 196;
Los Angeles Brush Mfg. Co. v. *James,* 272 U. S. 701;
Ex parte State of New York, 256 U. S. 490;
Ex parte Peterson, 253 U. S. 300, 305;
Ex parte Simons, 247 U. S. 231;
Bereslavsky v. *Caffey, D. J.,* 161 F. 2d 499, cert. den. 332 U. S. .....

The condition imposed by the statute becomes operative only when an order is made fixing the amount of the security. In the absence of personal liability, a stay is the only available mode of effectuation of the condition (*Shielcrawt* v. *Moffett,* supra). The effect of a stay is to prevent the accrual of expense, to which the subject corporation is made liable by virtue of Section 64 because of the institution of the action, until security to meet it is given. There can be no appeal now from the order denying the security and the stay. No matter what the event of the action, the petitioner cannot obtain adequate relief by appeal from the judgment because, after judgment, there is no available mode of effectuation of the condition. By the language of the statute itself the petitioner is entitled to security "at any stage of the proceedings before final judgment" and "final judgment" means judgment after trial (*Matter of Bailey,* 265 App. Div. 758, 761). The need of the petitioner for review by mandamus is at least as compelling as the need of the petitioners in the cases where it was allowed. The need for it here is emphasized by the circumstance that the Southern District of New York (in

Boyd v. *Bell,* 64 F. Supp. 22, and in *Craftsman F. & M. Co.* v. *Brown,* 64 id. 168) and the Eastern District of New York (in *Donovan* v. *Queensboro Corporation,* dec. Nov. 17, 1947, U. S. Law Week Dec. 9, 1947, 16 L. W. 2266) have reached contradictory results with respect to the applicability of the statute.

Reference is made to the brief of the petitioner in support of its motion and petition for a writ of mandamus, in the alternative to a writ of certiorari, filed simultaneously herewith for a more extended discussion of this and the other points herein advanced.

B

THE PETITIONER IS ENTITLED TO SECURITY IN THE AMOUNT APPLIED FOR AND TO A STAY OF PROSECUTION OF THE SUBJECT ACTION UNTIL IT IS GIVEN, BECAUSE SECTION 61-B OF THE NEW YORK GENERAL CORPORATION LAW CREATES A NEW AND VALUABLE SUBSTANTIVE RIGHT AND EXPRESSES AND IMPLEMENTS THE PUBLIC POLICY OF NEW YORK IN RELATION TO A SCANDAL AND AN ABUSE FOUND BY THE LEGISLATURE OF NEW YORK TO EXIST IN THE FIELD OF STOCKHOLDERS' DERIVATIVE ACTIONS.

Reference is here made to the memorandum written by the Governor of New York in approving Section 61-b of the New York General Corporation Law printed in the Appendix hereto and to:

Shielcrawt v. *Moffett,* supra (294 N. Y. 180), rev'g 268 App. Div. 352, and 184 Misc. 1074, cited in per curiam opinion of court below;

Matter of Baker v. *Macfadden Publications, Inc.,* supra (270 App. Div. 440).

The petitioner relies upon:

Angel v. *Bullington,* 330 U. S. 183, cited in *Donovan* v. *Queensboro Corporation,* supra (U. S. Law Week, Dec. 9, 1947, 16 L. W. 2266);

Guaranty Trust Co. v. *York,* 326 U. S. 99;

Palmer v. *Hoffman*, 318 U. S. 109;
Pecheur Lozenge Co. v. *National Candy Co.*, 315 U. S. 666;
Klaxon Company v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487;
Griffin v. *McCoach*, 313 U. S. 498;
Sibbach v. *Wilson*, 312 U. S. 1;
Six Companies, etc. v. *Joint Highway District*, 311 U. S. 180;
Vandenbach v. *Owen-Illinois Glass Co.*, 311 U. S. 538;
Stoner v. *New York Life Ins. Co.*, 311 U. S. 464;
Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208;
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64;
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202;
New York Life Ins. Co. v. *Jackson*, 304 U. S. 261;
Rosenthal v. *New York Life Ins. Co.*, 304 U. S. 263;
Hudson v. *Moonier*, 304 U. S. 397.

For the proposition that Section 61-b would be applicable in the federal courts if it imposed a personal liability instead of a condition, see *Sioux County* v. *National Surety Co.*, 276 U. S. 238.

To the extent that the apparent merits may be thought pertinent, reference is made to the affirmative allegations of the answers (R. 78-86, 88-96, 99-106) and, in the light thereof, to:

Everett v. *Phillips*, 288 N. Y. 227;
Blaustein v. *Pan-Amer. P. & T. Co.*, 293 N. Y. 281, aff'g 263 App. Div. 97;
Turner v. *American Metal Co.*, 268 App. Div. 239;
Myer v. *Myer*, 271 App. Div. 465, aff'd 296 N. Y. 979.

On the authority of those cases, the result is almost certain to be in favor of some or all of the individual defendants, and, for that reason, the liability of the petitioner for their expenses or a substantial part thereof is virtually absolute.

C

THE STATUTE IS NOT REPUGNANT TO ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES OR OF THE STATE OF NEW YORK INVOKED BY THE RESPONDENT.

I

EQUAL PROTECTION OF THE LAWS

The petitioner cites among a long line of cases:

Rapid Transit Corp. v. *New York,* 303 U. S. 573;
West Coast Hotel Co. v. *Parrish,* 300 U. S. 379;
Bayside Fish Co. v. *Gentry,* 297 U. S. 422;
Dohany v. *Rogers,* 281 U. S. 362;
Jones v. *Union Guano Co.,* 264 U. S. 171;
Middleton v. *Texas P. & L. Co.,* 249 U. S. 152;
Armour & Co. v. *North Dakota,* 240 U. S. 510;
M. K. & T. Ry. Co. v. *Cade,* 223 U. S. 642, 648;
Atchison, T. & S. F. R. Co. v. *Matthews,* 174 U. S. 96, limiting and nullifying as precedent *Gulf, etc., Ry. Co.* v. *Ellis,* 165 U. S. 150.

II

DUE PROCESS OF LAW

The petitioner cites:

Life & Cas. Ins. Co. v. *McCray,* 291 U. S. 566;
Dohany v. *Rogers,* supra;
Jones v. *Union Guano Co.,* supra;
Cincinnati St. Ry. Co. v. *Snell,* 193 U. S. 30;
Fearon v. *Treanor,* 272 N. Y. 268.

III

OBLIGATION OF CONTRACT

The petitioner cites:

Middleton v. *Texas P. & L. Co.,* supra;
Henley v. *Myers,* 215 U. S. 373, 385;

Waggoner v. *Flack*, 188 U. S. 595;
Myer v. *Myer*, 271 App. Div. 465, aff'd 296 N. Y. 979 (supra).

In connection with the unique nature of stockholders' derivative actions, see *Holmes* v. *Camp*, 180 App. Div. 409. In connection with the preservation of the right of action, it is noted here that the corporation itself retains its primary right and that the officers and directors, a creditor, a trustee, a receiver and the New York Attorney-General retain derivative rights under Sections 60-61 of the New York General Corporation Law, wholly unaffected by Section 61-b. Stockholders owning the requisite number of shares in the aggregate likewise remain free to join, before the commencement of an action, in order to sue, unhindered by the condition imposed by Section 61-b.

IV

FULL FAITH AND CREDIT

The argument that the full faith and credit clause is violated by Section 61-b is wholly without support.

See:

Delaware General Corporation Law, Sec. 2(10);
State Farm Mutual Automobile Ins. Co. v. *Duel*, 324 U. S. 154, 160;
Pink v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, 209-211;
Pacific Employers Ins. Co. v. *Industrial Accident Commission*, 306 U. S. 493, 501;
Alaska Packers Ass'n v. *Industrial Accident Commission*, 294 U. S. 532, 547.

See also:

Palmer v. *Hoffman*, 318 U. S. 109.

V

THE POLICE POWER AND THE RESERVED POWER TO AMEND

In support of the proposition that the statute is a valid exercise of the police power of the state, the petitioner cites:

Home Bldg. & Loan Assn. v. *Blaisdell,* 290 U. S. 398;
Thornton v. *Duffy,* 254 U. S. 361;
Jones v. *Portland,* 245 U. S. 217;
Manigault v. *Springs,* 199 U. S. 473;
Crowley v. *Christensen,* 137 U. S. 86;
Fearon v. *Treanor,* 272 N. Y. 268.

In support of the proposition that New York has reserved, by virtue of Article X, Section 1, of its Constitution, the power to enact Section 61-b as an amendment to the charters of all domestic corporations and as a condition to the assertion within its borders of rights of action on behalf of foreign corporations the petitioner cites:

Missouri Pac. R. Co. v. *Kansas,* 216 U. S. 262;
Northern Cent. R. Co. v. *Maryland,* 187 U. S. 258;
Spring Valley Water Works v. *Schotter,* 110 U. S. 347;
Close v. *Glenwood Cemetery,* 107 U. S. 466, 476;
Railway Co. v. *Philadelphia,* 101 U. S. 539;
Sinking Fund Cases, 99 U. S. 721;
German-American Coffee Co. v. *Diehl,* 216 N. Y. 57;
Peo. v. *Fire Assn., etc.,* 92 N. Y. 311, aff'd 119 U. S. 110.

VI

STATE CONSTITUTIONAL PROVISION

For the proposition that the New York rule of constitutional law is to adopt the construction of like provisions of the Constitution of the United States expounded by this Court, the petitioner cites *Bourjois Sales Corp.* v. *Dorfman*, 273 N. Y. 167, overruling *Doubleday, Doran & Co.* v. *Macy & Co.*, 269 N. Y. 272, on the authority of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183.

CONCLUSION

A WRIT OF CERTIORARI AS PRAYED FOR IN THE PETITION SHOULD ISSUE.

Respectfully submitted,

DEAN HILL STANLEY,
Counsel for Petitioner.

WILLIAM F. BLEAKLEY,
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of Counsel.

APPENDIX

State Statutes

The state statute on which the petitioner's right to the order for security depends is Section 61-b of the New York General Corporation Law, being Section 61-b, Article 6, of Chapter 23 of the Consolidated Laws of New York, added by Chapter 668 of the Laws of 1944 and amended by Chapter 869 of the Laws of 1945 (22 McKinney's Consolidated Laws of New York, Annotated, Sec. 61-b). The statute here cited is as follows:

> "In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five per centum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

The statute above quoted refers to "section sixty-four of this chapter". That reference is to Section 64 of the New York General Corporation Law, being Section 64, Article 6-A, of Chapter 23 of the Consolidated Laws of

New York, added by Chapter 869 of the Laws of 1945 and derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Sec. 64). The statute here cited is as follows:

> "Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

The statute above quoted refers to "section sixty-five, sixty-six and sixty-seven of this chapter" and to "section sixty-eight of this chapter". Those references are to Sections 65-68, both inclusive, of the New York General Corporation Law, being Sections 65-68, both inclusive, Article 6-A, Chapter 23 of the Consolidated Laws of New York, all added by Chapter 869 of the Laws of 1945, Sections 65-67, being derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Secs. 65-68). The statutes here cited are as follows:

> "65. Application for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, or for assessment of expenses pursuant to section sixty-four of this chapter, may be made either

(a) in the action, suit, or proceeding brought in this state in which such expenses were incurred or (b) to the supreme court in a separate proceeding. Such application shall show the disposition of any previous application made to any court. If not made in the action, suit or proceeding in which the expenses were incurred, such application shall also show reasonable cause for failure to make application in such action, suit or proceeding.

"66. An application pursuant to section sixty-five of this chapter shall be made in such manner and form as may be required by applicable rules of court or in the absence thereof by direction of the court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to such other persons as it may designate in such manner as it may require.

"67. If after hearing an application for payment or for assessment of expenses, the court shall find that the applicant, his testator or intestate was successful in whole or in part, or that the action against him has been settled with the approval of the court, the court shall grant such application in such amount as it shall find to be reasonable, and shall make an order directing the corporation to pay to the applicant the amount awarded; provided, however, that no award of indemnity or assessment of expenses shall be made in any case where it shall appear (i) that the law of the state of incorporation of the corporation prohibits such indemnity or assessment; or (ii) that the award would be inconsistent with any action of the stockholders or members of the corporation taken prior to and in effect at the time of the accrual of the alleged cause of action; or (iii) if there has been a settlement approved by the court, that the award would be inconsistent with any condition with respect to payment of indemnity or assessment of expenses expressly imposed by the court in approving such settlement.

"68. Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:

"(a) when the corporation against whom the application is made for assessment of expenses pursuant to section sixty-four or for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, is a domestic corporation or a corporation doing business in this state;

"(b) when such expenses were incurred in an action or proceeding maintained in a court in this state;

"(c) when the application is made by a resident of this state and the director, officer or employee was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred."

Section 61-a of the New York General Corporation Law hereinabove referred to was repealed by Chapter 869 of the Laws of 1945.

Section 67, supra, refers to the law of the state of incorporation. The petitioner is a Delaware corporation (R. 62). Section 2(10) of the Delaware General Corporation Law is as follows:

"To indemnify any and all of its directors or officers or former directors or officers or any person who may have served at its request as a director or officer of another corporation in which it owns shares of capital stock or of which it is a creditor against expenses actually and necessarily incurred by them in connection with the defense of any action, suit or proceeding in which they or any of them, are made parties, or a party, by reason of being or having been directors or officers or a director or officer of the corporation, or of such other corporation, except in relation to matters as to which any such director or officer or former director or officer or person shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty. Such indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled, under any by-law, agreement, vote of stockholders, or otherwise."

N. B. By appropriate corporate action the petitioner has bound itself to indemnify the individual defendants for their expenses in the aforesaid action in accordance with the power conferred upon it by the statute above cited (R. 33-34).

Other state statutes referred to in this brief are Sections 60-61 of the New York General Corporation Law, being Sections 60-61, Article 6, Chapter 23 of the Consolidated Laws of New York (numbered Sections 90-91 prior to general amendment effected by Chapter 650 of the Laws of 1929), originally derived from Sections 1781-1782 of the Code of Civil Procedure (22 *McKinney's Consolidated Laws of New York,* Secs. 60-61). The statutes here cited are as follows:

> "60. An action may be brought against one or more of the directors or officers of a corporation to procure judgment for the following relief or any part thereof:
>
> "1. To compel the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.
>
> "2. To compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties.
>
> "3. To suspend a defendant from exercising his office for an abuse of his trust.
>
> "4. To remove a defendant from office and to direct the filling of the vacancy in accordance with the charter and by-laws of the corporation, or, if they contain no provision therefor, in such manner as the court shall direct.
>
> "5. To set aside a transfer of property, made by one or more directors of a corporation, contrary to a provision of law, where the transferee knew the purpose of the transfer.

"6. To enjoin such a transfer where there is good reason to apprehend that it will be made."

"61. An action may be brought for the relief prescribed in section sixty of this chapter, by the attorney-general in behalf of the people of the state, or except for the relief specified in the third and fourth subdivisions of said section by the corporation or a creditor, receiver or trustee in bankruptcy thereof, or by a director or officer of the corporation.

"Upon the application of either party the court shall make an order directing the trial by jury of the issue of negligence, and for that purpose the questions to be tried must be prepared and settled as prescribed in section four hundred and twenty-nine of the civil practice act.

"In any action brought by a shareholder in the right of a foreign or domestic corporation it must be made to appear that the plaintiff was a stockholder at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law."

Federal Statutes

A pertinent federal statute is the Enabling Act of 1934 authorizing the promulgation of Federal Rules of Civil Procedure (48 Stat. 1064, 28 U. S. C., Sec. 723-b), which is, in part, as follows:

> "The Supreme Court of the United States shall have power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

New York State Constitutional Provisions

The following provisions of the Constitution of the State of New York are or may be pertinent:

> "Article I—Section 6: No person shall be deprived of life, liberty or property without due process of law."
>
> "Article I—Section 11: No persons shall be denied the equal protection of the laws of this state or any subdivision thereof."
>
> "Article X—Section 1: Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The source of the foregoing extracts is 2 *McKinney's Consolidated Laws of New York, Annotated.*

Federal Constitutional Provisions

The following provisions of the Constitution of the United States are or may be pertinent:

"Article I—Section 10. No state shall * * * pass any * * * Law impairing the Obligation of Contracts."

"Article IV—Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *."

"Amendment V. No person shall be * * * deprived of life, liberty or property without due process of law;"

"Amendment X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"Amendment XIV—Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Memorandum of Governor

The following is the text of the memorandum of the Governor of New York published in connection with his approval of Section 61 (third paragraph) and 61-b, supra:

"These two bills represent an effort to meet the problem created by the baseless so-called 'strike' stockholder suit against corporation directors and officers.

"In recent years a veritable racket or baseless lawsuits accompanied by many unethical practices has grown up in this field. Worse yet, many suits that were well based have been brought, not in the interest of the corporation or of its stockholders, but in order to obtain money for particular individuals who had no interest in the corporation or in its stockholders. Secret settlements—really pay-offs for silence—have been the subjects of common suspicion.

"There is no simple or immediate cure.

"The first of these bills provides that a stockholder's suit may be brought only if the stockholder is an owner

of stock at the time of the transaction concerning which he complains. This incorporates into the state law the rule that has long obtained in the federal courts.

"The second bill provides that no stockholder's action may be brought unless the plaintiffs own at least five per cent of the shares of the corporation or unless their shares have a value in excess of $50,000.00 without putting up security for reasonable expenses including attorney's fees which may be incurred in the defense of the action.

"There has been a great deal of misunderstanding concerning this second bill. It does not bar any action; it does not bar any right. It simply requires that the plaintiff represent a certain minimum of interest in the corporation or that he put up security for the costs and expenses, which will be incurred if his case is determined to be unfounded.

"There are many classes of actions in this State and in other states where the party must put up security for costs. It has frequently been suggested in this State that no action should be brought except upon the putting up of security for costs. This particular bill affects only one kind of action which has been the subject of great abuse and malodorous scandal.

"Even if the stockholder owns only a tiny percentage or only $5.00 worth of stock, it still should be simple to bring an action without putting up security. If his action has any merit at all, it should be easy enough to interest others who do hold at least 5%, or stock valued at $50,000.

"In the cases requiring security, the amount is left to the discretion of the court. This would be substantially the same court which now has the power in that kind of action to impose payment of counsel fees upon the unsuccessful defendant. It would seem that if the court could be trusted for the one purpose, it could be trusted for the other.

"These bills represent a healthy experiment in cleansing our law courts of disreputable practices. The law will not be like the laws of the Medes and the Persians. It can be relaxed or altered as experience dictates in the future. But it is time for a start in the solution of the problem.

"The bills are approved.

"(Signed) THOMAS E. DEWEY"

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 569

THE ASPINOOK CORPORATION,
Petitioner,

vs.

THE HONORABLE JOHN BRIGHT, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILTON PAULSON,
Attorney for Respondent.

On the Brief:
GLORIA AGRIN.

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Opinions Below

The opinion, *per curiam,* of the Circuit Court of Appeals for the Second Circuit and the concurring opinion of Frank, J., are printed at pages 116-118 of the record; and are not officially reported. The respondent rendered no opinion in the District Court.

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended by the Act of February 13, 1925;

and, in the alternative, under Section 262 of Judicial Code (28 U. S. C. A., Sec. 377), as amended by the Act of March 3, 1911.

Summary of Argument

We contend:

I. This case involves neither a question of public importance, nor, a conflict of decision among the Circuit Courts. Certiorari is not ordinarily granted merely to review alleged error, prior to final decree. In any event, the Court below committed no error in refusing to grant a writ of mandamus.

II. Section 61-b of the New York General Corporation Law is a procedural statute, not binding upon the federal courts. Respondent properly refused to apply that section in denying petitioner's motion for security. The Court below properly refused to require respondent to reverse himself.

III. Assuming that Section 61-b is substantive law, it violates the Constitution of the United States.

I

The Court below denied petitioner's application for a writ of mandamus upon the ground that the circumstances did not warrant the exercise of its power to grant that extraordinary remedy (R. 116-118). It is not suggested by petitioner that the Circuit Court thereby determined any question of wide public importance, or one involving a conflict of decision among the Circuit Courts. The instant application for a writ of certiorari is based solely upon the ground that in arriving at its decision the Court below committed error (Pet. Br., p. 6).

Certiorari will not ordinarily be granted merely to review alleged error (*Cyclopedia of Federal Procedure*, 2nd Ed., Vol. II, Section 5400, p. 11). This is particularly true

where such review is sought prior to final decree (*American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893); *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916)).

In any event, the Court below committed no error in refusing to grant a writ of mandamus under the circumstances of the instant case. Mandamus is granted or withheld in the sound discretion of the Court (*Ex parte Republic of Peru*, 318 U. S. 578, 584 (1943)). It is well settled, however, that the extraordinary remedy of mandamus is reserved for "really extraordinary causes" (*Ex parte Fahey*, 332 U. S. 258 (1947)). The denial, therefore, of an application for a writ of mandamus is erroneous only if it involves an abuse of the discretion which lower Courts have frequently been cautioned to exercise sparingly (*United States Alkali Exp. Assoc.* v. *United States*, 325 U. S. 196 (1945); *In the Matter of Peterson*, 253 U. S. 300 (1920); *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943)).

The subject action is an ordinary civil suit between private litigants. The issue presented to respondent was simply whether the plaintiff should be required to furnish security for certain expenses or whether he could prosecute the suit without posting such security. Such a controversy can hardly be said to fall within the category of "really extraordinary causes" for which the extraordinary remedy of mandamus is reserved.

If mandamus is available to review the denial of petitioner's motion for security, then there is no reason why any other interlocutory order in a civil suit should not likewise be reviewed by mandamus proceedings. The Court below recognized that to grant mandamus in the circumstances of the case at bar would be to "invite continued resort to it for various and sundry steps preliminary to trial which a litigant finds expensive or otherwise disturbing" (R. 117).

The only extraordinary circumstance which petitioner claims to exist in the case at bar is the alleged inadequacy

of its remedy by appeal from the interlocutory order denying its motion for security (Pet. Br., p. 16). The Court below, in rejecting that contention declared (R. 117):

> "Here, if after final judgment, either party appeals to this court, full review and protection of the parties can be afforded; only in the single instance where judgment goes against the suing plaintiffs *and* they choose not to appeal will there be a chance of the corporation suffering loss because of its statutory duty, N. Y. General Corporation Law, Section 64, to reimburse its officers for their expenses in winning. Such burdens accompanying success in litigation are of course usual in our jurisprudence." (Italics, the Court's.)

Indeed, the lower Court held that many cases where a writ of mandamus was refused, "show circumstances of at least as much, if not greater, potential loss of rights or position, as is here indicated" (R. 117).

Moreover, a litigant has no absolute or constitutional right of appeal (*Millslagle* v. *Olson,* 130 F. 2d 212, 214, 8th Cir. (1942)). The complete absence of the right of appeal "is not in itself sufficient to invoke the power of mandamus" (*U. S. ex rel. C. etc. Co.* v. *Interstate C. C.,* 294 U. S. 50, 62 (1935)).

It is well settled that mandamus will not be granted unless the right to be enforced is clear and definite. "The purpose of the writ is not to establish a legal right, but to enforce a right which has already been established • • •" (*U. S.* v. *Nordbye,* 76 F. 2d 744, 746, 8th Cir. (1935)).

Petitioner's right to security under Section 61-b is doubtful, to put it mildly. The overwhelming weight of authority holds that Section 61-b is a procedural statute not applicable in the federal courts (*Boyd* v. *Bell,* 64 F. Supp. 22 (S. D. N. Y., 1945); *Craftsman Finance & Mortgage Co.* v. *Brown,* 64 F. Supp. 168 (S. D. N. Y., 1945); *Cohen* v. *Beneficial Industrial Loan Corporation,* 7 F. R. D. 352 (D. N. J., 1947)). In the Court below, Judge Frank based

his concurrence in the denial of mandamus upon the ground that Section 61-b was a procedural statute (R. 118).

In addition, there is grave doubt as to the constitutionality of Section 61-b. The Circuit Court of Appeals expressly referred to the "suggestions of unconstitutionality in Zlinkoff, *The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law*, 54 Yale L. J. 352, and article by Mr. Hornstein in 32 Calif. L. Rev. 123, and 47 Col. L. Rev. 1" (R. 118).

Accordingly, the Court below properly held that it "should not act in a case where the legal right is clouded in so much doubt as is here indicated" (R. 117).

We submit that under the circumstances in the case at bar the denial by the Court below of petitioner's application for a writ of mandamus was not an abuse of its discretion, but, on the contrary, was in complete accord with the decisions of this Court. The instant application, therefore, for a writ of certiorari is entirely without legal basis.

II

In any event, Section 61-b is a procedural statute which respondent properly declined to follow in denying petitioner's motion for security (*Boyd* v. *Bell, supra; Craftsman Finance & Mortgage Co.* v. *Brown, supra; Cohen* v. *Beneficial Industrial Loan Corporation, supra*). In the Court below Judge Frank expressed the view that (R. 118):

> "I think we should deny the petition on the ground that Judge Bright's order was correct because, as he held, the New York statute is 'procedural' so far as the federal courts are concerned. I agree substantially with his reasoning in *Boyd* v. *Bell*, 64 F. Supp. 22. See also *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 178-179; *Cohen* v. *Beneficial Industrial Loan Corp.*, 7 F. R. D. 352; cf. *Picard* v. *Sperry Corporation*, 36 F. Supp. 1006, 1009-1010, affirmed 120 F. (2d) 328 (C. C. A. 2); *Galdi* v. *Jones*, 141 F. (2d) 984, 992 (C. C. A. 2)."

Had the majority of the Court below reached that question, they would undoubtedly have come to the same conclusion.

Rule 23(b) of the Federal Rules of Civil Procedure is similar to Section 61-b in that both impose restrictions and conditions upon the institution of derivative actions; and both leave unaffected the cause of action itself. The Federal Courts have uniformly held that Rule 23(b) is procedural (*Perrott* v. *United States,* 53 F. Supp. 953 (D. Del., 1944); *Summers* v. *Hearst,* 23 F. Supp. 986 (S. D. N. Y., 1938)).

The New York State Court has squarely held that a New Jersey statute, identical with Section 61-b, is procedural (*Shielcrawt* v. *Moffett,* 184 Misc. 1074, 56 N. Y. S. 2d 134). The Governor of New York State, in his message approving Section 61-b, expressed the view that the legislation was remedial, not substantive, when he stated "It does not bar any action; it does not bar any right".

Section 61-b of the New York General Corporation Law is, we submit, a procedural statute which respondent was not obliged to follow. He committed no error in denying petitioner's motion for security based on that section. The Court below committed no error in refusing to require respondent to reverse himself.

III

Section 61-b of the New York General Corporation Law deprives petitioner and its stockholders of their property without due process in violation of the Fourteenth Amendment of the Constitution.

Petitioner's right of action against its faithless fiduciaries is a property right (*Pritchard* v. *Norton,* 106 U. S. 124, 132 (1882)). Section 61-b has reduced the right of petitioner's stockholders to bring a derivative action to an empty formality. The amount of security which the stockholder can be called upon to furnish—$90,000 in the in-

stant case (R. 13)—is prohibitive. The stockholders' remedy is barred as effectively as if the statute had abolished it in terms. As stated by this Court, "want of right and want of remedy are the same thing" (*Edwards* v. *Kearzey*, 96 U. S. 595, 600 (1878); *Ex parte Young*, 209 U. S. 123, 147 (1908); *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, 47 (1922)).

This Court has long recognized "the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed" (*Graham* v. *Goodcell*, 282 U. S. 409, 426 (1931)). Plaintiff acquired his stock in petitioner upon the assumption that he obtained a legally protected "indivisible interest in the property and assets of the corporation" (*Pollitz* v. *Gould*, 202 N. Y. 11, 15 (1911)). Section 61-b destroys this protection.

Section 61-b is not a reasonable exercise of the state's police power (*Nashville C. & S. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 (1935); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922)). This Court denied the existence of police power in the states to impede access to the Courts through the imposition of liability for counsel fees in *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*, *supra*, and in *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566, 574 (1934).

A statutory fine of $5,000 was struck down in *Ex parte Young*, *supra*, as foreclosing access to the Court. Liquidated damages of $500 were held unconstitutional for the same reason in *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 340 (1913).

The liability to which plaintiff here is subject is clearly and unmistakably prohibitive. "A judicial review beset by such deterrents does not satisfy the constitutional requirements" (*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337 (1920)).

Section 61-b denies to plaintiff in the subject action the equal protection of the laws. It requires security from the small stockholder, but not from the large. Such a

classification is arbitrary and capricious, and bears no relationship to the objectives of the statute (*Frost* v. *Corporation Commission*, 278 U. S. 515, 522 (1929); *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214 (1945); *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155 (1897)).

The statute bears all the earmarks of "invidious discrimination" (*Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 85 (1946)), which makes it obnoxious to the Fourteenth Amendment (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942)).

Finally, it should be observed that Section 61-b denies full faith and credit to the public acts of the State of Delaware in violation of Article IV, Section 1, of the Constitution of the United States.

Under the laws of Delaware plaintiff could prosecute this action without incurring any obligation to furnish security for expenses. The State of Delaware is "competent to legislate" concerning that subject matter (*State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 160 (1945)). It is for Delaware, not for New York, to say whether stockholders in its corporations, as the price for bringing a derivative suit against the corporate directors, must assume responsibility for the expenses of the litigation (*Cohen* v. *Beneficial Industrial Loan Corporation, supra*). New York cannot force such protection upon a corporation organized in a foreign state which does not wish to give it. No legitimate interest of New York is affected if the foreign corporation, in accordance with the laws of its origin, does not receive reimbursement (*Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389 (1924); *Order of United Commercial Travelers* v. *Wolfe*, 67 S. Ct. 1355 (1947)).

> "It seems clear that section 61-b violates both the due process and equal protection clauses of the state and federal constitutions" (*Zlinkoff, The American Investor and the Constitutionality of Section 61(b) of the New York General Corporation Law, supra*, 54 Yale L. J., at 390).

Conclusion

The decision of the Circuit Court of Appeals is in accordance with the principles of law established by this Court. No question of public importance is presented and there is no conflict of decision. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MILTON PAULSON,
Attorney for Respondent.

On the Brief:
GLORIA AGRIN.

APPENDIX

Text of Sections 61-b and 64 of the General Corporation Law of New York

Section 61-b. *Security for expenses.*

In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five percentum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifity thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.

Section 64. *Assessment of expenses.*

Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed

against the corporation or against another corporation
the request of which he served as such director, officer
employee, upon court order, in the manner and to the exte
provided by sections sixty-five, sixty-six and sixty-seve
of this chapter, and in the instances specified in sectio
sixty-eight of this chapter, except in relation to matte
as to which it shall be adjudged in such action, suit
proceeding that such officer, director or employee is liab
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duties.